[2023] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO 17/2019

JERMAINE DALEY v R

Ms Shadae Bailey for the applicant

Ms Syleen O'Gilvie and Ms Debra Bryan for the Crown

24, 26, 31 July 2023 and 23 February 2024

Criminal law - Illegal possession of firearm - Shooting with intent - Reliability of the visual identification evidence - No case to answer - Relevant principles

Criminal law – Summation - Adequacy of the trial judge's directions – Adequacy of good character directions - Whether there was a substantial miscarriage of justice

Criminal law – Identification - Informal identification parade - Whether there was a risk of exposure of accused prior – Effect of any such exposure – Constabulary Force Act - Jamaica Constabulary Force Rules, 1939

DUNBAR GREEN JA

Introduction

[1] On 20 December 2018, the applicant was convicted before Wiltshire J ('the learned trial judge'), sitting in the High Court Division of the Gun Court, on an indictment, for the offences of illegal possession of firearm, and shooting with intent. On 1 February 2019, he was sentenced to concurrent terms of five years' imprisonment at hard labour for the former offence and 12 years' imprisonment at hard labour for the latter.

[2] A single judge of this court refused the applicant's application for leave to appeal against his convictions and sentences.

[3] On 24 and 26 July 2023, we heard the applicant's renewed application for leave to appeal against his convictions and sentences. After considering the submissions of counsel, we made the following orders:

> "1) The application for leave to appeal against conviction and sentence is refused.
>
> 2) The convictions and sentences are affirmed.
>
> 3) The sentences are reckoned as having commenced on 1 February 2019, the date on which they were imposed."

[4] We promised then to reduce into writing our reasons for the orders. This is a fulfilment of that promise.

The case for the prosecution

[5] At about 7:00 am on 20 December 2011, five police officers, including Constables Orando Bennett and Dennis Barton ('the constables'), were on mobile patrol in the Hunts Bay police area, in the parish of Saint Andrew. They received certain information, via a police radio transmission, and drove along Spanish Town Road in the said parish, in pursuit of a white Toyota motor car ('the motor car'). Constable Barton was the driver of the police service vehicle ('the service vehicle') in which they travelled. Constable Bennett, the observer, was seated in the front passenger seat. The motor car was signalled to stop but it failed to stop, and sped up. Eventually, it crashed into a utility pole at the junction of Henley and West Bay Farm Roads. The service vehicle came to a stop, approximately 20ft from the motor car, and Constable Bennett exited the service vehicle.

[6] Four occupants emerged from the motor car, three of whom were armed with guns. The armed men opened gunfire at the police who took cover and returned gunfire. The three armed men, one of whom was later identified as the applicant, continued firing

at the police as they sought to make their escape on foot. A subsequent search of the area to which they fled revealed what appeared to be a trail of blood on the ground, and a camouflage jacket.

[7] Later that day, Detective Sergeant Melbourne Watson, the investigating officer, had cause to visit the applicant at the University Hospital of the West Indies ('the hospital') where he was being treated for gunshot wounds. Detective Sergeant Watson cautioned the applicant, and interviewed him. He then placed the applicant under police guard at the hospital, on suspicion of shooting at the police.

[8] On 9 February 2012, the applicant was identified by Constable Bennett, at an informal identification parade ('the parade') that was held in a cell at the Hunt's Bay Police Station. The parade was conducted by Inspector Desmond Roache. The applicant was subsequently charged for the offences of illegal possession of firearm, and shooting with intent.

[9] At trial, the prosecution called multiple witnesses, including Constables Bennett and Barton. Constable Bennett was challenged on his credibility, and the reliability of his evidence, including his purported identification of the applicant at the parade.

The case for the defence

[10] The applicant gave sworn evidence and called one witness, Mr Alexander Reid, who he said he knew as "Dah Dah", for 15 years. The applicant contended that he was in the "cash for gold" business, and on the morning of the shooting, he was picked up by "Dah Dah", his regular taxi driver, who was to transport him to Saint Thomas to trade in 'cash for gold'. On their way, he received a call that led him to Mona Road, in August Town, to meet a potential customer. Upon his arrival at the location, he was held up and robbed by two men, one of whom was armed with a firearm. In a struggle with the men, he was shot. Meanwhile, Dah Dah made a hasty retreat. As a consequence, he (the applicant) was taken to the hospital where he underwent emergency surgery for gunshot

wounds. Upon being discharged, he was held in custody at the Hunts Bay Police Station from where he was taken, unmasked, to receive medical treatment at the hospital.

[11] His witness, Mr Reid (Dah Dah), supported his alibi defence as to the circumstances which he said led to his gunshot injuries.

[12] When convenient, the applicant will also be referred to as the assailant.

Grounds of appeal

[13] At the commencement of the hearing of his renewed application, the applicant was granted an extension of time to file skeleton submissions, and permission to argue seven supplemental grounds of appeal, in substitution for the original grounds of appeal. The supplemental grounds are as follows:

> "**GROUND ONE (1)**
>
> The learned Trial Judge erred in law when she failed to uphold a submission of no case to answer in circumstances where the quality of the identification evidence was weak and manifestly unreliable.
>
> **GROUND TWO (2)**
>
> The learned trial judge erred in her summation when she ruled that the circumstances under which [the] observation was made did not constitute a weakness in [the] identification evidence.
>
> **GROUND THREE (3)**
>
> The trial judge committed an error in her summation by neglecting to address crucial omissions in the Prosecution's case, which directly impact[ed] the reliability of the identification evidence. This failure resulted in an unfair verdict.

GROUND FOUR (4)

The Learned Judge erred when she ruled that there was no risk of exposure of the Appellant prior to the identification parade, which resulted in an unfair verdict.

GROUND FIVE (5)

The court failed to thoroughly evaluate the Applicant's evidence of good character thereby casting doubt on the safety of the verdict.

GROUND SIX (6)

A sentence of twelve (12) years is manifestly excessive and unjust.

GROUND SEVEN (7)

The verdict is unreasonable and cannot be supported having regard to the weight of the evidence. By that miscarriage of justice, the convictions ought to be quashed and the sentence set aside."

[14] Supplemental ground six was abandoned during the course of oral argument.

GROUND ONE (1): whether the learned trial judge erred in law when she failed to uphold a submission of no case to answer, and in circumstances where the quality of the identification evidence was weak and manifestly unreliable

Submissions for the applicant

[15] Ms Bailey, appearing for the applicant, submitted that the learned trial judge was plainly wrong when she failed to uphold a submission of no case to answer. This error lay in her failure to recognise and assess the adequacy of the identification evidence at the end of the prosecution's case. Counsel argued that, had the learned trial judge examined the evidence, she would have recognised that the purported observations of the assailant, by the identifying witness (Constable Bennett), cumulatively, amounted to a borderline fleeting encounter, occurring amidst challenging circumstances; and that the material upon which the purported identification was made was not sufficiently

substantial to "obviate the ghastly risk of mistaken identification". Consequently, it was incumbent on the learned judge to withdraw the case from her jury mind.

[16] Counsel argued further that the visual identification evidence was weak in terms of (a) the opportunities for observation of the assailant; (b) the duration of the purported observations; (c) the distance of the assailant from the observer in each sighting; (d) the positioning of the observer vis-à-vis the assailant; and (d) the observations having been made during an exchange of gunfire between the police and the armed men while the latter were being pursued by the former.

[17] In support of these submissions, counsel relied on **R v Galbraith** [1981] 1 WLR 1039, and **Dwayne Knight v R** [2017] JMCA Crim 3, particularly, para. [30].

Submissions for the Crown

[18] Counsel appearing for the Crown, Ms O'Gilvie, also relied on the principles laid down in **R v Galbraith**, and further directed the court's attention to **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 and 93/2006, judgment delivered 21 November 2008, particularly, para. 35, as authoritative support for the approach which has been adopted by this court in contested identification cases.

[19] Counsel for the Crown submitted that the learned trial judge did consider the totality of the identification evidence, as she was required to do, which included that the incident took place at about 7:00 am in broad daylight; the applicant wore conspicuous attire (army camouflage jacket, blue jeans, and dreadlocked hairstyle); Constable Bennett (the identifying witness) was the closest of the police officers to the applicant; the applicant fell during the incident; the applicant turned parts of his body towards the constables as he ran, which provided an opportunity for Constable Bennett to see his face; Constable Bennett's view of the applicant was not obstructed in any way; the respective sightings of the applicant, by Constable Bennett, were for four seconds and 15 seconds at 20 ft and 30 ft away respectively; and the applicant was positively identified

on an informal identification parade by Constable Bennett. That evidence, counsel for the Crown argued, was not of a tenuous nature. Neither were the prosecution's witnesses so manifestly discredited that the learned trial judge ought to have withdrawn the case from her jury mind.

Discussion

[20] The principles relevant to a submission of no case to answer are well settled. Lord Lane CJ in **R v Galbraith** outlined the test to be applied. Relevant to the instant case is the second limb of that test which is stated in the headnote of the case as follows:

> "…if there is some evidence but it is of a tenuous character (e.g. because of inherent weakness or vagueness or because it is inconsistent with other evidence), it is the judge's duty, on a submission of no case, to stop the case if he comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it; but, where the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or on other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the accused is guilty, then the judge should allow the matter to be tried by the jury…"

[21] Lord Widgery CJ, in **R v Turnbull and Another** [1977] QB 224 ('**R v Turnbull**'), enunciated these additional considerations at pages 229-230:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions…[t]he judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

[22] In **Dwayne Knight v R**, at para. [30], McDonald-Bishop JA characterised the duty of the trial judge in this way:

> "… [t]he learned trial judge [has] a non-delegable duty to assess the weaknesses in the identification evidence at the close of the prosecution's case It was incumbent on him ... to demonstrably consider the cumulative effect of such weaknesses on the quality of the identification and to ensure, at the end of his assessment, that there was a substantial evidential basis upon which the identification could be found to have been correct."

[23] In **Herbert Brown and Mario McCallum v R**, Morrison JA (as he then was) stated, at para. [35]:

> "…[T]he critical factor on the no case submission in an identification case, where the real issue is whether in the circumstances the eye witness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the 'ghastly risk' (as Lord Widgery CJ put it in **R v Oakwell** [1978] 1 WLR 32, 36-37) of mistaken identification."

[24] At trial, the prosecution relied substantially on the evidence of Constable Bennett. He testified that during the shooting incident, he first observed the applicant's face for about four seconds, at a distance of 20 ft, without obstruction. This included a period of one second in which Constable Bennett was taking cover beside the parked service vehicle. Constable Bennett also said that he had seen the face of the applicant for another 15 seconds, during the exchange of gunfire between the armed men and the police, at a distance of some 30 ft. These alleged sightings occurred in broad daylight.

[25] Constable Bennett also testified that he did not know the assailant before, but confirmed that he had noted in his witness statement that he was of dark complexion with dreadlocked hairstyle, and was wearing an army camouflage jacket. He further testified that the characteristics of the assailant were distinctly different from those of the other two armed men, who were each wearing blue jeans pants, t-shirt, low-cut hairstyle, and were of light complexion.

[26] The driver of the service vehicle, Constable Barton, also gave evidence in which he described one of the armed men as Rastafarian and wearing an army green shirt and a pair of blue jeans pants. However, he stated that he was unable to point out the applicant or say whether he was one of the armed men.

[27] In making the no case submission, counsel for the applicant at the trial ('defence counsel'), drew the learned trial judge's attention to aspects of the evidence that he regarded as weaknesses in the identification evidence. These were, in the main, the following omissions from Constable Bennett's written statement: (a) a description of the assailant's face; (b) any information that Constable Bennett had seen the assailant's face, and the duration of any such observation; and (c) any description of the firearm which the witness said the assailant used in the attack. Defence counsel had also referred to the absence of a plausible explanation for the omissions, and pointed to the discrepancy between the constables as to whether Constable Bennett was seated in the service vehicle when the armed men started to fire at the police. Also raised for the learned trial judge's consideration, was whether the applicant had been exposed prior to the parade.

[28] For its part, the prosecution argued that the omissions were not fatal since the witnesses were not bound by the four corners of their statements; Constable Bennett was the observer and, therefore, likely to have been keener in his observations; from his vantage point, Constable Bennett was able to see the face of the applicant; Constable Bennett's ability to observe the faces of the armed men was substantiated by the fact that he was able to give a description of each of them; the applicant was the only assailant who was wearing a dreadlocked hair style; the incident occurred in broad daylight; the applicant was first observed, by Constable Bennett, at a distance of 20 ft for four seconds; the shooting lasted for 30 seconds during which Constable Bennett saw the applicant's face for another 15 seconds; the applicant was positively identified, on an identification parade, by Constable Bennett; an explanation was given for the type of parade used; and there was no evidence that the applicant was exposed to Constable Bennett prior to the parade.

[29] The defining issue in this ground of appeal is whether the evidence of Constable Bennett provided a substantial basis upon which the identification of the applicant could be found to have been correct, and therefore, sufficient for the learned trial judge's jury mind. Put another way, was a prima facie case made out on the evidence? As the authorities suggest, in making that determination, the learned trial judge was duty-bound to assess the strengths and weaknesses of the identification evidence, at the close of the prosecution's case, and "demonstrably consider" the cumulative effect of the weaknesses on the quality of the identification. We believe she did so.

[30] During the summation, at page 164 of the transcript, the learned trial judge addressed her mind to the question of the strengths and weaknesses in the prosecution's case. This was part of her assessment of the identification evidence that began on page 162. She said at page 164:

> "With respect to the circumstances, [sic] the observation was taking place while there was exchange of gunfire, and from the static position of the police officers, as well as while they were in pursuit of the perpetrators. The Court recognizes that that wouldn't have been a weakness in the observation, the circumstances regarding the observation of the officers and in particular of Constable Bennett's observation of the perpetrators and the perpetrator in particular. He also says that the particular perpetrator was firing as he ran, and he did indicate in his evidence that none of the individuals, none of them were known to him prior to this incident occurring. The Court however, takes into consideration, the timing, a total of thirty seconds while there was an exchange of gun firing, as well [sic] his evidence that he was able to view the face of one particular perpetrator for a period of fifteen seconds and nothing was obstructing that man's face. So certainly, the Court is of the view that there was the sufficient opportunity, despite the circumstances for the witness to properly observe the face of the perpetrator and I find that Constable under the circumstances, given the fact, properly observed the face of the perpetrator. He further responded that although they were under fire and he was in fear for his life and the life of his colleagues, that he did not find the circumstances as being stressful."

[31] The identification evidence contrasts starkly with that in **Dwayne Knight v R**. In that case, the face of the appellant (who was previously known by the witnesses) had been observed for under two to three seconds, at night time, aided by a headlight. That was in circumstances where the appellant wore a hoodie that had fallen off, where one witness was reversing a motor car when he made the observation, and while the other witness was consoling her child in the backseat of the car. The witnesses also purported to have seen the perpetrator's face through the windscreen when he fell on the road in front of the car, and the hoodie fell from his head, at a distance of some 18 to 20 ft.

[32] Unlike the case of **Dwayne Knight v R**, the applicant (although not known before by Constable Bennett) was purportedly identified, by face, in two sightings which were in relatively quick succession, for longer periods, in broad daylight. The applicant's face was purportedly observed, initially, for four seconds, during a part of which Constable Bennett was stationary, and then for a further 15 seconds. Further, the applicant was said to have turned parts of his body, while running, thus allowing Constable Bennett to have viewed his face for the further 15 seconds.

[33] Additionally, Constable Bennett's designated task was that of observer; he was said to have been closer to the applicant than the other police officers in the party while they pursued the armed men on foot; the applicant stood out because the attire allegedly worn by him was conspicuously different from that worn by the other armed men; there was no evidence that Constable Bennett had lost sight of any of the armed men before they escaped onto premises in the area; and Constable Bennett positively identified the applicant on an identification parade.

[34] Having assessed the identification evidence, at the close of the prosecution's case, in its totality, against the background of decided cases, we have formed the view that it met the threshold test of being "sufficiently substantial to obviate the ghastly risk" of a mistaken identification. In our view, Constable Bennett's observations, if accepted, could not be characterised as a "fleeting glance or on a longer observation made in difficult conditions". The circumstances, as outlined by a trained police officer, when viewed

cumulatively, in our view, were not so challenging to have required a withdrawal of the case from the learned trial judge's jury mind.

[35] We also do not consider Constable Barton's inability to positively identify the applicant as fatal to the prosecution's case. The evidence was that he was the driver, had exited the service vehicle after Constable Bennett, and was behind Constable Bennett whilst they were in pursuit of the men. Furthermore, there was other evidence which, if believed, could support the correctness of the identification.

[36] We, therefore, do not agree with counsel for the applicant that the learned trial judge was plainly wrong in deciding not to withdraw the case from her jury mind. Ground one, therefore, fails.

GROUND TWO (2): whether the learned judge erred in her summation when she ruled that the circumstances under which the observation was made did not constitute a weakness in the identification evidence

Submissions for the applicant

[37] Ms Bailey indicated that the following challenging circumstances substantially compromised Constable Bennett's ability to effectively observe the men's faces, and, consequently, undermined the reliability of the identification evidence:

(i) the crossfire between the police and the three armed men lasted for 30 seconds;

(ii) upon exiting the vehicle, the police officers were immediately attacked by the armed men which endangered their lives and induced fear in them;

(iii) the relentless movements of the men, along with the intermittent turns and firing actions, essentially reduced the time-frame for observation into smaller fragments than

Constable Bennett stated (distinguishing **Separue Lee v R** [2014] JMCA Crim 12); and

(iv) from the "static" position, Constable Bennett would have seen the assailant for less than four seconds which, taken at its highest, was a fleeting glance and of no probative value (relying on **R v George Weir and Michael Kenton** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 46 & 47/1989, judgment delivered 24 September 1990, and **Dwayne Knight v R**).

[38] Any purported observation in such circumstances, counsel argued, ought to have been characterised as a weakness in the prosecution's case (relying on **Jermaine Plunkett v R** [2021] JMCA Crim 43). Added to the circumstances militating against a correct identification, counsel argued, was an internal inconsistency in Constable Bennett's evidence in relation to the purported length of his observation of the assailant's face during the first sighting. Counsel contrasted Constable Bennett's evidence (on pages 22 and 58 of the transcript) that he observed the assailant's face for four seconds, before the men started firing, with his evidence under cross-examination (at page 56 of the transcript), that one second had passed between when the men exited the crashed motor car and the first explosion.

[39] The learned trial judge, counsel further argued, erred by (a) specifically stating that the circumstances under which observations were allegedly made of the assailant's face, during the exchange of gunfire, did not amount to a weakness in the identification evidence; (b) not dealing with the evidence that the armed men were running on the left side from an angle; and (c) misquoted the evidence, viz.: "the man was running and looking behind him from time to time".

[40] Counsel correctly pointed out that the evidence was that the assailant was consistently "turning his hand and various parts of his body".

[41] The effect of these errors, counsel submitted, was an unfair verdict.

Submissions for the Crown

[42] Counsel for the Crown submitted that the weaknesses highlighted by Ms Bailey were sufficiently addressed in the summation. The learned trial judge, she argued, not only properly identified the issues for determination as those of visual identification, credibility, alibi, the integrity of the identification parade, and the character of the applicant, but went on to say that visual identification was a live issue; but went on to review the evidence, noting the inconsistencies, examining the circumstances in which the applicant was observed, and evaluating the issues with the identification parade.

[43] Counsel for the Crown, therefore, disagreed that the learned trial judge's misstatement of the evidence resulted in any unfairness to the applicant, particularly, in light of the evidence accepted by her, in relation to the two sightings of the applicant, including when he turned his body.

[44] In addressing the purported conflict in the evidence, as regards the length of the initial observation of the assailant's face, by Constable Bennett, counsel for the Crown observed, in oral arguments, that there was no conflict as the evidence was that, the initial observation was made of the applicant's face for four seconds, one second of which was the period between when Constable Bennett first exited the service vehicle and when he took cover.

Discussion

[45] We do not agree with counsel for the applicant that observations made of an assailant while involved in an exchange of gunfire with the police, automatically render the visual identification unreliable, as much depends on the number and duration of the sightings, and the distance of the identifying witness from the person being identified, among any other evidence that supports the correctness of the identification.

[46] The case for the prosecution was wholly dependent on the visual identification of the applicant. In the circumstances, the learned trial judge recognised that she had a duty to warn herself of the special need for caution before relying on the identification of the eye-witness to convict the applicant, and that it was possible for an honest witness to make a mistaken identification. She was also mindful of the need to closely examine and assess the circumstances in which the visual identification was made, including any specific weaknesses and their cumulative effect on the quality of the identification. We are not of the view that she failed in either respect.

[47] We find her approach to have been consistent with the guidance of Lord Widgery CJ in **R v Turnbull**, at page 228:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken."

[48] The authorities have also made it plain that the **Turnbull** warning need not be done in any specific form of words, so long as its terms are clear. At page 163, the learned trial judge said:

> "I have warned myself that I have to be careful in my assessment of this evidence [identification evidence], as I must bear in mind that a very honest witness may be mistaken...I must also warn myself that it is dangerous to convict on evidence of the visual identification, unless I am satisfied..."

Having warned herself accordingly, she proceeded to apply the caution in analysing the evidence. She detailed the circumstances under which the visual identification was made, including the two sightings that Constable Bennett said he had of the applicant; the time

the incident occurred; the lighting conditions; the distance from which the observations were made; and the absence of any obstruction to the applicant's face. She considered that the applicant was not previously known to the witness, and highlighted and commented on the discrepancy in the evidence of Constables Bennett and Barton. She also observed that Constable Bennett was closer to the applicant than Constable Barton, when they were in pursuit of the armed men.

[49] It was while analysing that evidence, that the learned trial judge made the statement that the purported observation of the applicant's face was not a weakness in the identification. Specifically, at the point of the particular remark, she was adverting to the cumulative effect of the sightings (from a stationary position and while in pursuit of the armed men). Her reference to Constable Bennett's statement that he did not find the circumstances stressful was further clarification of the impugned finding.

[50] As regards the discrepancy between the evidence of Constables Bennett and Barton - as to whether Constable Bennett had exited the service vehicle before or after the men started firing on them - the learned trial judge resolved it in this way, at pages 162-163 of the transcript:

> "The court recognizes that there will be variations in the evidence given by witnesses and having examined the evidence with respect to the viewing of the witnesses, either prior to or post exiting the vehicle, [sic] that the inconsistency is such that it is so material and affects the credibility of the evidence given of the observation of the perpetrators who shot at the complainants."

[51] Ms Bailey also complained that, under cross-examination, Constable Bennett indicated that he had observed the assailant for one second, but this was not addressed by the learned trial judge.

[52] At page 55 of the transcript, the following exchange took place between defence counsel and Constable Bennett:

> "Q: How many seconds, minutes or hours would have elapsed between the time you heard the first explosion and the time you took cover?
>
> A: Repeat.
>
> Q: How many minutes, second or hour would have past [sic] between the time the men exited the vehicle and the time you took cover?
>
> A. About a second."

[53] Also, on page 56 of the transcript, the following exchange occurred between defence counsel and Constable Bennett:

> "Q: You said, sir, that between the time the men exited the vehicle and the time that you heard the first explosion was one second?
>
> A: Yes, sir."

[54] From those excerpts, it is plain that defence counsel posed three different questions to Constable Bennett. The first question sought a response as to the time between Constable Bennett's hearing of the first explosion and his taking cover. The second question addressed the time-frame between when the men exited the crashed motor car and Constable Bennett taking evasive action. In contrast, the third question spoke to the time- frame between the men exiting the vehicle and when Constable Bennett heard the first explosion. Clearly, none of those questions was about how long Constable Bennett observed the assailant's face. However, on page 56, Constable Bennett went on to give the following evidence about observing the face of the assailant for four seconds:

> "Q: If that is correct, sir, would it be true then to say that you were making your observation of these men whilst under gunfire?
>
> A: Yes.

> Q: Where were you when you alleged you made this four second observation sir?
>
> A: Which four second are you speaking of?
>
> Q: At the time you said you observed the face of your attacker for four seconds at first instance, where were you? Were you in motion heading towards that cover on the left whilst under gunfire or were you standing at the vehicle under gunfire…
>
> A: Between...
>
> Q: ...or between both?
>
> A: Standing at the vehicle and moving towards cover."

[55] The following exchange supports a conclusion that the initial four-second observation was not entirely from a stationary position.

> "Q: So you moved from a standing position into a crouch [sic] position and continued to move towards a hard cover?
>
> A: Yes, Sir.
>
> Q: And it was during this period that you made your four seconds observation?
>
> A: Yes, as also when I was at the cover."

[56] On this issue, the learned trial judge remarked at pages 157-158 of the transcript:

> "The question on whether Constable Bennett was or was not in the service vehicle when the men fired came under scrupulous examination as Counsel challenged his evidence by reference to his previous statement...Constable Bennett's explanation was that he moved away from the vehicle as it could not provide cover and prior to stepping away he was standing beside it. He further stated that within one second of the men exiting, he took cover and that involved ducking and moving away from the vehicle. He said he moved left to hard cover and while doing so, he was looking in the direction of the men. He, therefore, said there was this four-second observation made between standing at the vehicle and moving towards cover and when he was covered. In response

> to counsel, he said that while at the cover, his observation was less than four seconds."

[57] Counsel was, therefore, incorrect that the learned trial judge did not address the issue. Given that evidence, she was not plainly wrong to find that the men were also observed from a stationary position. That sighting was in addition to the other purported sightings including Constable Bennett's evidence of an unobstructed view of the applicant's face for a further 15 seconds during the exchange of gunfire

[58] The learned trial judge did misstate the evidence, as acknowledged, by counsel for the Crown. Nevertheless, this error was not fatal, given the evidence that she accepted, including that, while the men were running and shooting at the police they were turning body parts, and in the process of a 30-second encounter, Constable Bennett was able to see the applicant's face for an additional 15 seconds. The learned trial judge's failure to specifically address the evidence that the armed men were running on the left side from an angle was not an omission that resulted in an unfair verdict since there seemed to have been no clarification of it, or not much made about it, at the trial.

[59] This court's jurisdiction to interfere in a trial judge's decision, on the basis of a finding of fact, is well-known. We will "only interfere with a verdict...where any questions of fact are involved, if the verdict is shown to be obviously and palpably wrong" (see **R v William March, Michael Lawrence, Anthony Grant and Anthony Bailey** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 87, 155, 156 and 157/1976, judgment delivered 13 May 1977, at page 5). For the reasons stated above, we are not of the view that the learned trial judge inadequately considered or applied the **Turnbull** guidelines to the identification evidence. She was also not plainly wrong in her conclusion that the circumstances under which the observations of the assailant were made did not constitute a weakness in the identification evidence. Ground two, therefore, fails.

GROUND THREE (3): whether the learned trial judge committed an error, in her summation, by neglecting to address crucial omissions in the prosecution's case which directly impacted the reliability of the identification evidence

Submissions for the applicant

[60] Ms Bailey submitted that the learned trial judge erred by neglecting to address critical omissions from Constable Bennett's witness statement to the police after the incident, which, she argued, directly impacted the reliability of the identification evidence. Counsel highlighted the following omissions (a) a description of the assailant's facial features; (b) the duration and distance of Constable Bennett's observations of the assailant; and (c) and the different sightings of the assailants. Relying on **Dwayne Knight v R**, counsel contended that a witness must be deemed to be credible before his testimony can be relied on, but that was not recognised by the learned trial judge.

Submissions for the Crown

[61] Counsel for the Crown submitted that omissions are ultimately a matter of credibility which was the remit of the learned trial judge. Counsel for the Crown conceded that the learned trial judge did not specifically recall the omissions that were raised by defence counsel, but submitted that she was not required to expressly remind herself of every legal principle, or show that she handled every piece of the evidence during her summation (relying on **Shaun Cardoza and Lathon Hall v R** [2023] JMCA Crim 19 and **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ). Counsel for the Crown noted that the learned trial judge accepted Constable Bennett as a credible witness, having thoroughly reviewed and analysed the identification evidence as to the circumstances of the sightings of the applicant's face, and the sufficiency of the opportunities to observe him on the day of the shooting. Further, it could be inferred that acceptance of the witness as credible, meant that in sitting alone, without a jury, the learned trial judge had resolved the omissions in Constable Bennett's statement without expressly saying so.

Discussion

[62] The learned trial judge reminded herself that in criminal trials, it is common for conflicts to arise, and they must be resolved as matters of credibility. In **Steven Grant v R** [2010] JMCA Crim 77, at para. [69], Harris JA articulated the principle, thus:

> "[I]t must always be borne in mind that discrepancies and inconsistencies in a witness' testimony give rise to the issue of the credibility of that witness. Credibility is anchored on questions of fact. Questions of facts are reserved for the jury's domain as they are pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness testimony."

[63] And in **Shaun Cardoza and Lathon Hall v R**, at para. [26], F Williams JA observed:

> "[26] Additionally, it is now generally accepted that there is a difference between how a judge directs himself or herself when sitting alone; and how a judge is required to give warnings in a jury trial. This can, for example, be seen in the Caribbean Court of Justice in the case of Dioncicio Salazar v The Queen [2019] CCJ 15 (AJ). In that case Wit JCCJ at para. 29 observed as follows:
>
> > 'Equally, a judge sitting alone and without a jury is under no duty to 'instruct', 'direct' or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand."

[64] It has also been long recognised, that what is required of a judge sitting alone is to give a reasoned judgment. In **R v Dacres** (1980) 33 WIR 241, 249, the court stated as follows:

> "By virtue of being a judge, a Supreme Court judge sitting as a judge of the High Court Division of the Gun Court in practice gives a reasoned decision for coming to his verdict, whether of guilt or innocence. In this reasoned judgment he is expected to set out the facts which he finds to be proved and, when there is a conflict of evidence, his method of resolving the conflict."

[65] The particular omissions, in the instant case, emerged from the cross-examination of Constable Bennett. Firstly, at page 38 of the transcript, viz.:

> "Q: Now, would you agree, Officer, that the observation of the accused men or man's face is an important piece of detail in regards to this incident?
>
> A: Yes.
>
> Q: Would you agree, Officer, that when you drafted your statement in this matter you made no observation of seeing the accused man's face – sorry, you made no indication in your written statement that you saw the accused's man face, and that's your statement dated – you didn't even date it. That's the first – how many statements you did in this matter, sir?
>
> A: I did two statements.
>
> Q: All right. I'm suggesting in the first statement that you did, which is undated, you did not record in that statement that you saw this accused man's face, the man you alleged was the dreadlocks in the camouflage suit, that day.
>
> A: Yes, I did."

[66] Having been shown his statement, Constable Bennett accepted that the information was not included and explained the omission as an oversight.

[67] Then at pages 49 - 50, there was this exchange:

> "Q: ...Now Sir, would you agree that in your statement the extent of your description of the man you claim was wearing the camouflage jacket is as follows: one of the men is of dark complexion, about six feet tall, sporting a dreadlocks hairstyle. He was dressed in army camouflage brown and black jacket...' and there's a note here which I am unable to recognise'...
>
> A: Yes, sir.
>
> Q: Nothing about a description of his face; you would agree?
>
> A: I disagree.
>
> Q: You have a description of his face in this statement?
>
> A: Dark complexion.
>
> Q: Did you record anything?
>
> A: Dreadlock hairstyle."

[68] The other omissions complained about concerned the distance of Constable Bennett from the assailant during the purported sightings, and the description of the firearm, both of which were also explained, by Constable Bennett, as being oversights.

[69] We have observed that the learned trial judge did not specifically mention the omissions, but nevertheless, directed her mind to the correct legal principles regarding the treatment of inconsistencies and discrepancies in the evidence of witnesses. She articulated that conflicts do arise in the evidence of witnesses; and demonstrated an understanding that conflicts had to be examined in terms of their materiality and impact on the credibility of witnesses. Having regard to her observations and treatment of the contradictions, generally, it seems to us that she must have had the omissions in mind.

[70] It should also be considered that the evidence disclosed that Constable Bennett's statement was not entirely bereft of descriptions of the assailant, and that the no-case submission was mainly about the omissions. As regards the latter, it is reasonable to conclude that the learned trial judge must have given some consideration to the omissions in deciding whether the prosecution had made out a prima facie case.

[71] Additionally, as noted before, the learned trial judge had recognised that visual identification was a live issue, and gave herself an adequate **Turnbull** direction, highlighting how she would go about applying the facts of the case to those guidelines. For instance, at page 152 of the transcript, she indicated that visual identification and credibility were two of the issues she had to determine, after which she went through the identification evidence in minute detail, giving the appropriate directions. She then scrupulously assessed the evidence given by Constable Bennett, primarily whether he could be believed that he saw the applicant shoot at him and his colleagues. She went on to examine Constable Bennett's evidence, alongside all the other evidence, and decided that she could accept it. In assessing the evidence, she clearly demonstrated an awareness that the identification evidence had to be reliable for her to accept it. Therefore, it is unlikely that she would not have had the omissions in mind.

[72] For these reasons, the learned judge's failure to expressly treat with the omissions in Constable Bennett's statement did not result in unfairness to the applicant. Therefore, ground three fails.

GROUND FOUR (4): whether the learned judge erred when she ruled that there was no risk of exposure of the applicant prior to the identification parade, which resulted in an unfair verdict.

Submissions for the applicant

[73] Ms Bailey submitted that the learned trial judge inadequately evaluated the potential risk of exposure of the applicant before he was placed on the parade, and this led to her erroneous finding that there was no risk of exposure of the applicant. Counsel explained that the fact that both Constable Bennett and the applicant were present together at the Hunts Bay Police Station for two months, prior to the parade, with Constable Bennett having access to the lock-up area, meant there was a risk of exposure.

Submissions for the Crown

[74] Counsel for the Crown submitted that the learned trial judge carefully reviewed and analysed the evidence concerning the parade. She highlighted that there was no

evidence that the applicant and Constable Bennett ever came into contact at the police station, or elsewhere, between the shooting and the holding of the parade. In particular, there was no evidence that Constable Bennett went to the hospital while the applicant was there, and there was no evidence that the applicant's photograph was taken. Neither was there any evidence of tutoring such as was the case in **Noel Williams v The Queen** (1997) 1 WLR 548, nor evidence of influence on the parade by any of the police officers. Further, counsel for the Crown emphasised that the men on the parade had their heads covered, and had been selected with the participation of the applicant and his attorney-at-law.

Discussion

[75] The Jamaica Constabulary Force Rules, 1939 ('the Rules') which were made under the Constabulary Force Act, and published in the Jamaica Gazette on 29 July 1939, and which govern the conduct of identification parades, state, in part:

> "552. Identification Parades ---
>
> > In arranging for personal identification, every precaution shall be taken (a) to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed to the suspected person in particular instead of indifferently to all the prisoners paraded, and (b)to make sure that the witnesses' ability to recognize the accused has been fairly and adequately tested.
>
> 553. It is desirable therefore that: --
>
> ...
>
> > (ii) The witness shall be prevented from seeing the prisoner before he is paraded with other persons and shall have no assistance from photographs or descriptions."

[76] In **R v Michael McIntosh and Anthony Brown** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 229 and 241/88, judgment delivered on 22

October 1991, this court observed that the Rules are not mandatory but procedural, with any positive breach having the effect of weakening the weight to be given to an identification made at such a parade. Forte JA (as he then was) also stated that:

> "What must be the important consideration for the jury is whether in all the circumstances the identification was fair, and gave the witness the opportunity to independently and fairly and without any assistance identify his assailant."

[77] Courts have often found undesirable a parade in which a witness is allowed to view a suspect before (see, for example, **R v Leroy Hassock** (1977) 15 JLR 135). In **R v Dickman** (1910) 5 Cr App Rep 135 at 143, the court emphasised that "[the] police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it is so".

[78] The considerations of fairness apply equally to formal and informal parades (such as obtained in the instant case). It is, therefore, clearly not desirable that an accused, yet to be identified on a parade, should be in the same police station as a police witness; but this is not to say it is always practicable for the situation to be otherwise. Moreover, there was nothing in the evidence of the instant case to suggest or establish that any risk of exposure had materialised. The evidence discloses that the parade included eight men from the cells, some of whom were dreadlocked; they were selected in consultation with the applicant and his then attorney-at-law; and all eight men had their heads covered in turbans. In our view, nothing about this arrangement offends the threshold requirements of fairness and independence.

[79] The main criticism of the learned trial judge's treatment was that she failed to find that there was a risk of exposure. That was, in our view, entirely a matter for the learned trial judge to decide, based on the evidence she accepted as proved. There was no complaint from the applicant, or anyone, that the applicant had come into contact with Constable Bennett while he (the applicant) was being held at Hunts Bay Police Station, or at the hospital, and that Constable Bennett had taken his photograph at the

hospital (as was suggested to Constable Bennett by defence counsel in cross-examination). There was also no complaint that the description of the dreadlocked assailant, identified in Constable Bennett's statement, did not fit the applicant. The relevant complaint was about the description being inadequate.

[80] As arbiter of the facts, the learned trial judge recognised her role in determining whether there were any improprieties or irregularities as regards the parade, and the effect on the fairness of the trial. There is no question in our minds that she recognised that the risk of exposure was a serious issue which was likely to affect the weight of the identification evidence, and that she gave it adequate consideration. At page 169 of the transcript, she said:

> "Counsel has also submitted that the identification parade had been compromised as the accused had been exposed and could have been exposed as well. There was no evidence given of Mr. Daley being exposed. He stated that no one took his picture, he made no identification of any officers in particular, who named Constable Bennett as being any of the officers who had come to the University Hospital while he was there. He gave no evidence of seeing Constable Bennett on any of the occasions that he was taken for treatment. Therefore, there is great speculation that he was, in fact, exposed in particular to Constable Bennett on any of the occasions while he was at the hospital or housed at the Hunt's Bay Lockups. **The Court does not accept that he was, in fact, exposed to any officers on occasions**." (Emphasis added)

[81] After a careful review of the evidence, the learned trial judge accepted the evidence of Constable Bennett that, he had not seen the applicant at the Hunts Bay Police Station prior to the holding of the parade. She also directed her mind to the evidence that, although the applicant was identified in what has been described as a "confrontation parade" (more aptly described as 'an informal identification parade'), the heads of the eight persons forming the parade were wrapped in a similar manner to disguise their hairstyles. The learned trial judge's conclusion, with which we find no fault, is that the

applicant was not exposed. That finding, in the circumstances, does not merit this court's intervention. For those reasons, this ground also fails.

GROUND FIVE (5): whether the court failed to thoroughly evaluate the applicant's evidence of good character thereby casting doubt on the safety of the verdicts.

Submissions for the applicant

[82] Ms Bailey submitted that the learned trial judge should have placed greater emphasis on the good character of the applicant in light of the weaknesses in the identification evidence. Counsel stated that such failure, coupled with the flawed summation, put in doubt the safety of the verdict.

Submissions for the Crown

[83] Counsel for the Crown, relying on **Marlon Campbell v R** [2023] JMCA Crim 9 at para. [18], submitted that the learned trial judge's good character directions were adequate, she having considered both limbs of the good character direction, that is propensity and credibility, as she was required to do. Counsel for the Crown added that the good character direction was also in keeping with the guidance given in the Supreme Court of Judicature of Jamaica Criminal Bench Book ('the Bench Book').

Discussion

[84] There is a plethora of authorities indicating that – where a defendant is of good character he is entitled to a good character direction from the judge, when summing up the case. In **Leslie Moodie v R** [2015] JMCA Crim 16, Morrison JA (as he then was) at para. [125], made the following observations:

> "It is now fully settled law that where a defendant is of good character he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case. The standard direction will normally contain, firstly, a credibility direction, that is a direction that a person of good character is more likely to be truthful than one of bad character; and, secondly,

> a propensity direction, that is that he or she is less likely to commit a crime, especially one of the nature with which he or she is charged."

[85] In **R v Aziz** [1996] 1 AC 41, a decision from the House of Lords, Lord Steyn, at pages 50 - 51, stated the purpose behind the good character direction, in these terms:

> "It has long been recognised that the good character of a defendant is logically relevant to his credibility and the likelihood that he would commit the offence in question. That seems obvious. The question might nevertheless be posed: why should a judge be obliged to give directions on good character? The answer is that in modern practice a judge almost invariably reminds the jury of the principal points of the prosecution case. At the same time he must put the defence case before the jury in a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance."

[86] In **Teeluck and John v The State of Trinidad and Tobago** (2005) 66 WIR 319 at para. 33(i), the Privy Council explained that:

> "When a defendant is of good character, ie has no convictions of any relevance or significance, he is entitled to the benefit of a 'good character' direction from the judge when summing up to the jury, tailored to fit the circumstances of the case…"

[87] In the latter case, their Lordships also indicated that "the defendant's good character must be distinctly raised, by direct evidence from him, or given on his behalf, or by eliciting it in cross-examination of prosecution witnesses: *Barrow v The State* [1998] AC 846 at 852". See also the more recent case of **Mark Williams and Kevin Shirley v R** [2020] JMCA Crim 25.

[88] Against the background of those authorities, the applicant, having raised the issue of his good character in his evidence, was entitled to a good character direction, on both limbs, tailored to fit the circumstances. There is, however, no specific formulation, and a judge sitting alone need only show that she directed her mind to the direction relevant

to the circumstances. The learned trial judge, at page 170 of the transcript, treated with the applicant's good character in this way:

> "Mr. Daley, at the end of his sworn evidence, stated that he had never had any problems with the police before this incident. The Court is of the view that he has, therefore, put his character before it, and, therefore, I must remind myself that despite him having done so, good character is not a defence to the charges before the Court. I must, however, take what he has said into account when considering whether I accept what he has told me in his evidence. His statement also suggests that he has not offended in the past and, hence, I must also consider that it is less likely that he has now acted as it is alleged."

[89] Having regard to those remarks and the authorities, we are satisfied that the learned trial judge gave an adequate good character direction. The essence of the direction, necessitated by the evidence of the applicant's previous good character, was captured as she directed her mind to both the credibility and propensity limbs of the direction (see the direction at page 149 et seq. of the Bench Book). Whilst the direction was short on detail, it captured the essence of what was required. That being so, the applicant was not imperilled. Therefore, this ground also fails.

GROUND SEVEN (7): whether the verdict is unreasonable and cannot be supported having regard to the weight of the evidence.

Submissions for the applicant

[90] Ms Bailey contended that the convictions cannot stand as there is no evidence linking the applicant to the offences, save and except the tenuous purported visual identification evidence. In other words, the verdict is unreasonable having regard to the weight of the evidence. She submitted that the prosecution's reliance on visual identification evidence, in the absence of "possible DNA and gun-shot residue (GSR) evidence" resulted in unfairness to the applicant and a substantial miscarriage of justice. Counsel further raised for our consideration, evidence that the police had the opportunity to conduct DNA tests on the blood stains and the camouflage jacket purportedly retrieved

from the scene, but had failed to do so. Additionally, counsel complained that there was no evidence of any swabbing of the applicant's hand for GSR, which might have ruled out the applicant as having fired a weapon.

Submissions for the Crown

[91] Counsel for the Crown submitted that the verdict is supported by the quality and weight of the identification evidence, and that this court should only set aside the verdict if it were obviously and palpably wrong, citing **R v Joseph Lao** (1973) 12 JLR 1238. She also cited **Everett Rodney v R** [2013] JMCA Crim 1 to support her submission that a conviction based on findings of fact would only be overturned if it is shown that the verdicts are so against the weight of the evidence as to be unreasonable and unsupportable.

[92] Counsel for the Crown further submitted that the learned trial judge accepted the evidence of Constable Bennett and rejected parts of the evidence of Constable Barton as she was entitled to do. Also, she resolved the discrepancy between them as to whether Constable Barton was inside the service vehicle when the firing of shots started, and addressed her mind to the applicable law. Counsel for the Crown added, that as regards the absence of GSR evidence, the time lapse between the shooting and the investigating officer's arrival at the hospital would have likely been a material consideration. She also pointed to evidence that the applicant refused to supply a DNA sample for testing, and said that the absence of that type of physical evidence did not pose a detriment to the verdict.

Discussion

[93] In challenging a verdict of a jury (or judge sitting alone) on the ground that it was unreasonable and unsafe having regard to the evidence, it must be shown that the verdict is so against the weight of the evidence as to be unreasonable and unsupportable. The oft-cited case of **R v Joseph Lao** has set out the threshold test in the head note, at page 1238, as follows:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which tell for and against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable."

[94] The learned trial judge did not have to specifically recall every aspect of the evidence for there to be a safe verdict, and as we have already established. Such shortcomings as there were did not rise to a level as to render her verdict unreasonable and unsupportable. Specifically, the absence of DNA and GSR evidence would not necessarily render the verdict unsafe, provided that the visual identification evidence was sufficient.

[95] Specifically, at page 160 of the transcript, the learned trial judge addressed the absence of physical evidence when she stated:

> "He agreed that he had not ordered Mr Daley's hand to be swabbed, but he said given that it was because he had no information by the police. He also said that Mr Daley refused to give a DNA evidence sample…"

[96] And at page 169, she commented on the defence's posture in this way:

> "Counsel has also submitted that there was no swabbing for GSR and no DNA sample was taken. The Crown does concede that this, in fact, was so. However, except for the investigating officer or the Crown witnesses being asked about swabs and the investigating officer denied that he did not have same done, because he had no reason to, this was not taken much further by the Defence..."

[97] We note that the explanation, given by counsel for the Crown for the absence of a swabbing for GSR, amounts to no more than conjecture. The explanation for any such omission needed to come from the police, and when the investigating officer was questioned about it, in cross-examination, his response was that he had no reason to

have had any swabbing for GSR done. Clearly, the learned trial judge could not speculate about evidence that was not put before her. The little more than passing reference to GSR and DNA in the evidence did not require specific or detailed treatment of those matters in the summation. Neither did those matters undermine the evidence presented by the prosecution, or render it weak or insufficient, such that the learned trial judge could not safely rely on it.

[98] In our view, the learned trial judge adequately analysed the evidence, including the visual identification evidence, which was critical to her conclusion of guilt. She closely examined the circumstances in which the identification was made, highlighting both the strengths and weaknesses of the prosecution's case. She specifically highlighted the opportunities for Constable Bennett to have observed the applicant, the length of time he had him under observation, the distances he was from him when he made the observations, and the reasons he had to remember him distinctly from the other perpetrators. It was also found, by her, to be significant that the shooting took place in broad daylight and that Constable Bennett had a vantage point that Constable Barton did not have. The weaknesses in the prosecution's case would have included the fact that the applicant was not previously known to Constable Bennett. That weakness and others were considered in the learned trial judge's summation, at pages 155, 156 and 162 of the transcript.

[99] Having examined all the evidence, and in particular the purported visual identification evidence, we cannot say that it was poor or tenuous, and that the acceptance of it by the learned trial judge resulted in a substantial miscarriage of justice (section 14 of the Judicature (Appellate Jurisdiction) Act).

[100] For those reasons, ground seven fails.

Conclusion

[101] We have heard no convincing argument of any error in fact or law, by the learned trial judge, which would justify an interference with the applicant's convictions. For these reasons, we made the orders at para. [3] above.